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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 ALBERTO SILVA,) Case No. CV 06-6366 JTL
12)
13 Plaintiff,)
14) MEMORANDUM OPINION AND ORDER
15 v.)
16)
17 MICHAEL J. ASTRUE,)
18 Commissioner of Social)
19 Security,)
20 Defendant.)
21 _____)

22 PROCEEDINGS

23 On October 10, 2006, Alberto Silva ("plaintiff") filed a
24 Complaint seeking review of the Social Security Administration's
25 denial of his application for Supplemental Security Income benefits.
26 On October 31, 2006, Michael J. Astrue ("defendant") filed a Consent
27 to Proceed Before United States Magistrate Judge Jennifer T. Lum. On
28 November 1, 2006, plaintiff filed a Consent to Proceed Before United
States Magistrate Judge Jennifer T. Lum. Thereafter, on April 12,
2007, defendant filed an Answer to the Complaint. On June 18, 2007,
the parties filed their Joint Stipulation.

The matter is now ready for decision.

BACKGROUND

On July 25, 2005, plaintiff filed an application for supplemental security income benefits. (Administrative Record ["AR"] at 99-101). On July 27, 2005, plaintiff filed an application for disability insurance benefits. (AR at 45-47). The Commissioner denied plaintiff's applications for benefits. (AR at 22; 32-36; 102).

Thereafter, plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (AR at 30). On February 6, 2006, the ALJ conducted a hearing in Long Beach, California. (See AR at 103-28). At the hearing, plaintiff appeared with counsel and testified. (See AR at 107-20; 126-27). Alan Boroskin, a vocational expert, also testified at the hearing. (AR at 120-25).

On March 24, 2006, the ALJ issued his decision denying plaintiff's application for supplemental security income benefits and disability insurance benefits. (AR at 26-29). The ALJ determined that plaintiff was able to perform his past relevant work as a Christmas tree lot attendant or loader. (AR at 27, 28). In addition, the ALJ concluded that plaintiff had no exertional limitations, but was unable to perform close work or work requiring bilateral vision, should only work with large objects, and should avoid hazards such as working at heights, around dangerous machinery or automotive equipment. (AR at 28). Ultimately, the ALJ found that plaintiff was not disabled pursuant to the Social Security Act. (AR at 28).

Plaintiff filed a timely request for review of the ALJ's decision with the Appeals Council. (AR at 6). The Appeals Council denied plaintiff's request for review. (AR at 3-5).

Thereafter, plaintiff appealed to the United States District Court.

1 **PLAINTIFF'S CONTENTIONS**

2 Plaintiff makes the following claims:

- 3 1. The ALJ failed to properly evaluate plaintiff's obesity.
- 4 2. The ALJ erred in accepting the testimony of the vocational
- 5 expert.
- 6 3. The ALJ failed to provide clear and convincing reasons for
- 7 rejecting plaintiff's subjective symptom testimony.

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9 **STANDARD OF REVIEW**

10 Under 42 U.S.C. §405(g), this Court reviews the ALJ's decision to

11 determine whether the ALJ's findings are supported by substantial

12 evidence and whether the proper legal standards were applied. DeLorme

13 v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence

14 means "more than a mere scintilla" but less than a preponderance.

15 Richardson v. Perales, 402 U.S. 389, 401 (1971); Saelee v. Chater, 94

16 F.3d 520, 521-22 (9th Cir. 1996).

17 Substantial evidence is "such relevant evidence as a reasonable

18 mind might accept as adequate to support a conclusion." Richardson,

19 402 U.S. at 401. This Court must review the record as a whole and

20 consider adverse as well as supporting evidence. Morgan v. Comm'r,

21 169 F.3d 595, 599 (9th Cir. 1999). Where evidence is susceptible to

22 more than one rational interpretation, the ALJ's decision must be

23 upheld. Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995).

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DISCUSSION

A. The Sequential Evaluation

A claimant is disabled under Title II of the Social Security Act if he or she is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or...can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §423(d)(1)(A). The Commissioner has established a five-step sequential evaluation to determine whether a claimant is disabled. 20 C.F.R. §§404.1520, 416.920.

The first step in the sequential evaluation is to determine whether the claimant is presently engaging in substantially gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the defendant is engaging in substantially gainful activity, disability benefits will be denied. Bowen v. Yuckert, 482 U.S. 137, 141 (1987). Second, the ALJ must determine whether the claimant has a severe impairment. Parra, 481 F.3d at 746. Third, the ALJ must determine whether the impairment is listed, or equivalent to an impairment listed, in Appendix I of the regulations. Id. If the impediment meets or equals one of the listed impairments, the claimant is presumptively disabled. Bowen, 482 U.S. at 141. Fourth, the ALJ must determine whether the impairment prevents the claimant from doing past relevant work. Parra, 481 F.3d at 746. If the claimant cannot perform his or her past relevant work, the ALJ proceeds to the fifth step and must determine whether the impairment prevents the claimant from performing any other substantially gainful activity. Id.

The claimant bears the burden of proving steps one through four, consistent with the general rule that at all times, the burden is on

1 the claimant to establish his or her entitlement to disability
 2 insurance benefits. Parra, 481 F.3d at 746. Once this prima facie
 3 case is established by the claimant, the burden shifts to the
 4 Commissioner to show that the claimant may perform other gainful
 5 activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir.
 6 2006).

7 **B. The ALJ's Evaluation of Plaintiff's Obesity**

8 Plaintiff alleges that the ALJ failed to properly assess the
 9 effects of plaintiff's obesity on his ability to work. (Joint
 10 Stipulation at 4). Plaintiff argues that based on his height and
 11 weight, he suffers from Level III obesity. (Joint Stipulation at 5).
 12 As a result, plaintiff contends that the ALJ erred in concluding that
 13 plaintiff has no exertional limitations, specifically that plaintiff
 14 could stand and walk without limitation. (Joint Stipulation at 6).

15 Social Security Ruling 02-01p¹ defines obesity as a complex,
 16 chronic disease characterized by excessive accumulation of body fat.
 17 The extent of a person's obesity is categorized in three levels.²

19 ¹ Social Security Rulings are issued by the Commissioner to
 20 clarify the Commissioner's regulations and policies. Bunnell v.
 21 Sullivan, 947 F.2d 341, 346 n.3 (9th Cir. 1991)(en banc).
 22 Although they do not have the force of law, they are,
 23 nevertheless given deference "unless they are plainly erroneous
 24 or inconsistent with the Act or regulations." Chavez v. Dep't of
 25 Health & Human Servs., 103 F.3d 849, 851 (9th Cir. 1996).

26 ² Social Security Ruling 02-01p adopts the National
 27 Institute of Health's medical criteria for diagnosis of obesity
 28 which is based on an individual's Body Mass Index ("BMI"). An
 individual's BMI is the ratio of their weight in kilograms to the
 square of their height in meters. S.S.R. 02-01p. There are
 three recognized levels of obesity. *Id.* Level I obesity
 encompasses individuals with a BMI between 30.0 and 34.9, Level
 II encompasses individuals with a BMI between 35.0 to 39.9, and

(continued...)

1 Level III obesity is termed "extreme" obesity and carries with it the
2 greatest risk for developing obesity related impairments. S.S.R. 02-
3 1p. However, the level of obesity from which an individual suffers
4 does not correlate with any specific degree of functional loss. Id.
5 Instead, obesity is treated as a risk factor that increases an
6 individual's chance of developing impairments. Id.

7 According to the Social Security Rules, when evaluating obesity
8 to determine a claimant's residual functional capacity, the ALJ must
9 consider an individual's maximum remaining ability to do sustained
10 work activities in an ordinary work setting on a regular continuing
11 basis. S.S.R. 02-1p. As with other impairments, the ALJ should
12 explain how he determined whether obesity caused any physical or
13 mental impairments. Burch, 400 F.3d at 683.

14 Based on the record, plaintiff has not set forth any functional
15 limitations resulting from his obesity that the ALJ failed to consider
16 in his decision. Plaintiff argues that the ALJ failed to properly
17 assess the effects of plaintiff's obesity on his ability to work.
18 There is no evidence in the record, however, that suggests plaintiff's
19 obesity affected his ability to do any sustained work activities.

20 In the Disability Report questionnaire completed by plaintiff on
21 August 3, 2005, plaintiff did not mention his obesity or the effects
22 of obesity on his ability to work. (See AR at 55-60). When asked
23 "[w]hat are the illnesses, injuries or conditions that limit your
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25 ²(...continued)
26 Level III encompasses individuals with a BMI greater than or
equal to 40. S.S.R. 02-01p.

27 According to plaintiff's testimony, at the time of the
hearing plaintiff weighed 290 pounds and was 62 inches tall. (AR
28 at 116). Plaintiff's height and weight at the time of the
hearing results in a BMI of 53. (Joint Stipulation at 5).

1 ability to work", plaintiff replied, "[b]lurred vision; right eye
2 blinded." (AR at 55). In response to the question "[h]ow do your
3 illnesses injuries or conditions limit your ability to work,"
4 plaintiff made no mention of his obesity or obesity related
5 limitations and, instead, stated, "I cannot find any kind of
6 substantial work. I have very blurred vision and I cannot see from my
7 right eye. My left eye also has very bad vision." (AR at 55-56).

8 Similarly, in plaintiff's Disability Report Appeal completed on
9 November 2, 2005, plaintiff did not reference his obesity or the
10 effects of obesity on his ability to work. (See AR at 77-83). In his
11 appeal, plaintiff indicates that the only new illness, injury or
12 condition he suffered from since his previous disability report was
13 stress, and that he had gained weight due to lack of physical
14 activity. (AR at 77, 81).

15 At the ALJ hearing on February 6, 2006, plaintiff made no mention
16 of the effects of obesity on his ability to work. (See AR at 103-28).
17 Plaintiff was represented by counsel at the hearing. (AR at 103). In
18 his opening statement, plaintiff's counsel made no reference to
19 plaintiff's obesity or the effects of obesity on plaintiff's ability
20 to work. (AR at 106). Instead, his opening statement focused solely
21 on plaintiff's impaired vision. (Id.). In response to questioning by
22 the ALJ, plaintiff testified that he stopped working because his "eyes
23 were getting bad." (AR 108). Plaintiff did not mention obesity, or
24 the effects of obesity on his ability to work, even when the ALJ
25 specifically asked plaintiff if anything, aside from his vision, would
26 keep plaintiff from being able to work. (AR at 110-11). Plaintiff's
27 response to the ALJ's question was that his legs and back hurt and
28 that he sometimes experienced dizziness and pain in his left eye. (AR

1 at 111). Plaintiff testified that his back pain was the result of a
 2 fall and made no mention of obesity as a contributing factor to his
 3 pain. (AR at 111). Even on direct examination by counsel, plaintiff
 4 did not mention the effect of obesity on his ability to work.³ (See
 5 AR at 105-28).

6 Plaintiff bears the burden of establishing his entitlement to
 7 disability insurance benefits, and of showing that his impairment, or
 8 combination of impairments, prevent him from doing his past relevant
 9 work. Parra, 481 F.3d at 746. Plaintiff failed to meet this burden
 10 with regard to his obesity. Plaintiff provided no evidence of the
 11 effect of his obesity on his ability to work and failed to show that
 12 his obesity, combined with his other impairments, caused him any
 13 functional limitation.

14 Thus, plaintiff is asking that the Court make assumptions about
 15 his functional ability based solely on plaintiff's Body Max Index.
 16 (See Joint Stipulation at 5-6). The Social Security Regulations,
 17 however, specifically instruct the ALJ to "not make assumptions about
 18 the severity or functional effects of obesity combined with other
 19 impairments." SSR 02-01p. The ALJ's evaluation of the severity and

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 21 ³ Plaintiff's testimony at the hearing regarding his weight
 22 was limited to the following testimony on direct examination by
 23 counsel:

24 Q: How tall are you, by the way?

25 A: 5', about 5'2.

26 Q: How much do you weigh?

27 A: About 290 pounds.

28 Q: Is that your usual weight?

A: No, I used to be thinner. It's just, since I've been
 disabled, I've been sitting around a lot, you know what I mean?
 I can't, I'm scared to even go out, move around because look at
 me. You know, if I fall down, it's very hard for me to get up,
 you know.

(AR at 116).

1 functional effects of obesity was consistent with Social Security
2 Ruling 02-01p and the ALJ committed no error in his evaluation of
3 plaintiff's obesity.

4 **C. The ALJ's Use of the Vocational Expert's Testimony**

5 Plaintiff claims that the ALJ erred in accepting the testimony of
6 the vocational expert because it was based upon an incomplete
7 hypothetical. (Joint Stipulation at 9-10). Defendant claims that the
8 particular hypothetical with which plaintiff takes issue was not the
9 hypothetical upon which the ALJ based his decision. (Joint
10 Stipulation at 10-11). In his Reply, plaintiff concedes that
11 defendant is correct with respect to this issue. (Joint Stipulation
12 at 11). Accordingly, the ALJ's decision was proper.

13 **D. Plaintiff's Credibility**

14 Finally, plaintiff alleges that the ALJ he failed to provide
15 clear and convincing reasons for rejecting plaintiff's subjective pain
16 testimony. (Joint Stipulation at 12-13).

17 Pain of sufficient severity caused by a medically diagnosed
18 "anatomical, physiological, or psychological abnormality" may serve as
19 the basis for a finding of disability. 42 U.S.C. § 423(d)(5)(A); see
20 Light, 119 F.3d at 792. However, an ALJ need not believe every
21 allegation of disabling pain. See Orteza v. Shalala, 50 F.3d 748, 750
22 (9th Cir. 1995). Where there is no evidence of malingering, an ALJ
23 may reject a claimant's testimony regarding the severity of his or her
24 symptoms if the ALJ sets forth legally permissible, specific, clear
25 and convincing reasons for doing so. Smolen v. Charter, 80 F.3d 1273,
26 1283-84 (9th Cir. 1996). The ALJ must specifically identify what
27 testimony is credible and what evidence undermines the claimant's
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1 complaints. Morgan v. Comm'r of the Social Security Admin., 169 F.3d
2 595, 599 (9th Cir. 1999).

3 A finding that the claimant lacks credibility cannot be based
4 wholly on a lack of medical support for the severity of his pain.
5 Light, 119 F.3d at 792. A claimant need not produce evidence of pain
6 other than his own subjective testimony. Smolen, 80 F.3d at 1282.
7 Nor must a claimant present objective medical evidence of a causal
8 relationship between the impairment and the type of symptom. Id.;
9 Johnson v. Shalala, 60 F.3d 1428, 1433 (9th Cir. 1995). Rather, the
10 claimant need only produce objective medical evidence of an underlying
11 impairment which could reasonably be expected to produce the pain or
12 other symptoms alleged. Bunnell v. Sullivan, 947 F.2d 341, 344 (9th
13 Cir. 1991) (en banc); SSR 96-7p; see also SSR 96-3p. This approach
14 reflects the Ninth Circuit's recognition of the "highly subjective and
15 idiosyncratic nature of pain and other such symptoms," such that
16 "[t]he amount of pain caused by a given physical impairment can vary
17 greatly from individual to individual." Smolen, 80 F.3d at 1282.

18 When evaluating a claimant's credibility, the ALJ should consider
19 the claimant's reputation for lying, prior inconsistent statements
20 concerning his symptoms, and other testimony by the claimant that
21 appears less than candid; unexplained or inadequately explained
22 failure to seek treatment or to follow a prescribed course of
23 treatment; and the claimant's daily activities. Smolen, 80 F.3d at
24 1284. Conflicts in a claimant's statements or testimony support a
25 finding that the claimant lacks credibility. Fair v. Bowen, 885 F.2d
26 597, 604 n.5 (9th Cir. 1989).

27 An ALJ's findings are entitled to deference if they are supported
28 by substantial evidence in the record and are sufficiently specific

1 for the reviewing court to assess whether the decision was
2 impermissibly arbitrary. Bunnell, 947 F.2d at 345-56. As discussed
3 below, taken as a whole, the ALJ's reasons for rejecting plaintiff's
4 credibility withstand scrutiny.

5 Here, the ALJ provided three reasons for rejecting plaintiff's
6 testimony. First, the ALJ found that the medical evidence in the
7 record indicated plaintiff retained adequate vision in his left eye.
8 (AR at 27). Plaintiff testified he had difficulty finishing housework
9 and other chores because he is blind in his right eye and indicated
10 deteriorating vision. (AR at 73, 84). However, the medical evidence
11 indicates plaintiff retained limited vision in his left eye. (AR at
12 86-88). Based upon evaluation of the medical records, the ALJ
13 determined plaintiff "had a mildly constricted field of vision and a
14 good prognosis." (AR at 27). In addition, the ALJ relied on the
15 opinion of the state agency physician who opined plaintiff could
16 perform work at all exertional levels, with the exception of the
17 inability to perform close work, work requiring bilateral vision, and
18 work around hazards such as heights, dangerous machinery or automotive
19 equipment. (AR at 27, 89-98).

20 Next, the ALJ noted that no doctor had stated that plaintiff
21 could not work because of his vision problem. (AR at 27). Plaintiff
22 is required to produce objective medical evidence of an underlying
23 impairment which could reasonably be expected to produce the visual
24 impairment he alleges. See Bunnell, 947 F.2d at 344. As discussed
25 above, after reviewing the objective medical evidence in the record,
26 the ALJ concluded that the medical evidence did not support the
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1 existence of a disabling impairment that could reasonably be expected
2 to produce plaintiff's alleged symptoms. (AR at 27).

3 Finally, the ALJ properly cites to plaintiff's failure to seek
4 medical treatment as a factor in his decision to reject plaintiff's
5 subjective complaints. (AR at 27). Plaintiff offers no explanation
6 of why he did not seek treatment for his deteriorating vision. Such
7 failure to seek treatment, given his allegations of disabling pain,
8 constitutes an adequate ground for rejecting plaintiff's credibility.

9 An ALJ may rely on a plaintiff's conservative treatment regimen
10 to reject a plaintiff's testimony of disabling limitations or
11 disabling pain. Fair v. Bowen, 885 F.2d at 604. In Fair v. Bowen,
12 the Ninth Circuit affirmed an ALJ's credibility decision where the ALJ
13 stated, among other things, that the claimant received only minimal
14 conservative treatment for his various complaints. Id. The Ninth
15 Circuit also noted that a plaintiff could overcome an ALJ's
16 credibility decision by offering a credible explanation about the lack
17 of more serious treatment. See id. ("While such reasoning may not
18 hold up in all cases (there may be claimants with good reasons for not
19 seeking treatment and credible explanations for their ability to work
20 inside but not outside the home), it is sufficient here, as Fair has
21 not put forward any evidence that reconciles the inconsistency between
22 his words and his actions."); see also 20 C.F.R. § 404.1530 (listing
23 acceptable reasons for failure to follow prescribed treatment).

24 Thus, the Court concludes that the ALJ did not err in rejecting
25 plaintiff's subjective complaints and credibility.

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ORDER

After careful consideration of all documents filed in this matter, this Court finds that the decision of the Commissioner is supported by substantial evidence and that the Commissioner applied the proper legal standards. The Court, therefore, AFFIRMS the decision of the Commissioner of Social Security Administration.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: September 7, 2007

_____/s/
JENNIFER T. LUM
UNITED STATES MAGISTRATE JUDGE